bill charged a general scheme of monopoly, evidenced and carried out by (1) uniting in one corporation the business of several competing manufacturers; (2) subsequent acquisitions of competing businesses, patent rights, etc.; (3) a system of leasing shoe machinery with "tying clauses" in the leases, whereby the monopoly was extended and perpetuated. The District Court found on the facts that there was no substantial competition between the machines manufactured by the constituent companies before the combination; that neither the purpose nor the effect of the subsequent acquisitions was in any substantial degree to suppress competition; that the so-called "tying clause" in the leases were reasonable agreements made for legitimate business reasons, and not for the purpose or with the effect charged in the bill; that the general monopolistic intent alleged had not been proved; and that the defendant company's very large share of the total business in shoe machinery had been secured through its lawful patent monopoly of the best machines, combined with unusual business efficiency. From a decree for the defendants the United States appealed to the Supreme Court. *Held,* that in a case involving conflicting testimony on all the issues, most of which was heard in open court, great deference should be given to the findings of the trial judges; that these findings were justified by the evidence and should be affirmed; and that the facts proved did not show any violation of the Sherman Act. Day, Pitney and Clarke, JJ., *dissenting.* (McReynolds and Brandeis, JJ., took no part in the decision) *United States v. United Shoe Machinery Co.* (1918, U. S.) 38 Sup. Ct. 472.

See COMMENTS, p. 1060.

MORTGAGES—RIGHTS AND POWERS OF SUCCESSIVE MORTGAGEES—ASSIGNMENT OF RENTS AND PROFITS.—The holder of a fourth mortgage brought suit to foreclose and obtained a receiver to collect the rents in accordance with a provision in the mortgage deed. The owner of a prior mortgage, who was made a party, claimed the rents collected by the receiver by virtue of a provision in his mortgage deed giving him a right to enter and receive the rents and concluding "and said rents and profits are, in the event of any default, hereby assigned to the mortgagee. *Held,* reversing the decision of the Appellate Division, that the rents so collected belonged to the holder of the fourth mortgage. *Sullivan v. Rosson* (1918, N. Y.) 119 N. E. 405.

Even in the absence of any provision in the deed it is not unusual for equity to appoint a receiver of the rents and profits in case the security is inadequate. In such case, however, the mortgagee has no right to rents accrued prior to the receivership decree. A junior mortgagee who takes possession in person or by a receiver is entitled to the rents collected prior to a similar taking of possession by the senior mortgagee. *Ranney v. Peyser* (1880) 83 N. Y. 1; *Madison Trust Co. v. Axt* (1911) 146 App. Div. 121, 130 N. Y. Supp. 371. This is true even though the rents are expressly pledged as security to the senior mortgagee. *Freedman's Sav., Etc., Co. v. Shepherd* (1887) 127 U. S. 494, 502; 8 Sup. Ct. 1250. The reason for this is that such a provision is not an assignment; it gives to the mortgagee no right but only a *power* to create a right to the rents by the act of entry or by having a receiver appointed. Before the exercise of this power the *right* to the rents is still in the mortgagor, and the latter has both the power and the privilege of dealing with them as he pleases, as by reducing the amount of the rental, or assigning his right to a third party. *Frank v. N. Y. L. E. & W. R. R. Co.* (1890) 122 N. Y. 197, 221; 25 N. E. 332. One who claims the rent by virtue of an assignment from the mortgagor should therefore be preferred over another who has previously been given a mere power that he has not yet

exercised at the time of the assignment. It would be otherwise in case the holder of the power has a contract *right* also that the rents shall not be assigned. If the assignment antedates the power, as it did in the principal case, it nullifies the power altogether, and rents collected under the supposed power belong to the previous assignee. *Harris v. Taylor* (1898) 35 App. Div. 462, 54 N. Y. Supp. 864. Such an assignee can sue the tenant for the rents. *Thomson v. Erskine* (1901, App. T.) 36 Misc. 202, 73 N. Y. Supp. 166. The assignment is valid even though the assignee's right is conditional upon default by the mortgagor. *State Bank v. Cohen* (1910, Spec. T.) 68 Misc. 138, 123 N. Y. Supp. 747. It would seem to be entirely immaterial whether the assignment is effected by a separate document, as in *Harris v. Taylor,* or by appropriate words in the mortgage deed, as in *Thomson v. Erskine* and in the principal case. In the latter case, however, the provision may be given the interpretation that the words of assignment are merely redundant and refer only to rents and profits collected after possession has been taken by the mortgagee or by his receiver. *In re Banner* (1907, D. C. S. D. N. Y.) 149 Fed. 936; *In re Israelson* (1916, S. D. N. Y.) 230 Fed. 1000; *Abrahams v. Berkowitz* (1911) 146 App. Div. 563, 131 N. Y. Supp. 257. This was the construction given in the principal case, with the result that both mortgagees were held to have no right by assignment but only a power to create rights by entry or by a receivership, and the junior mortgagee was preferred because he exercised his power first. Such an interpretation may be reasonable, but the opinion of the lower court to the contrary, reported in (1915) 166 App. Div. 68, 151 N. Y. Supp. 613, is very persuasive.

NEGLIGENCE—INJURY TO VOLUNTEER IN WHOSE PRESENCE THE DEFENDANT HAS AN INTEREST.—The plaintiff, a professional dancer, by consent of the defendants, voluntarily attended and took part in the rehearsals for a revue to be given by the defendants, in the hope that she would thereby obtain an engagement in the revue when produced. She was under no contract with the defendants. While attending a rehearsal, she was injured by the negligence of a servant of the defendants. *Held,* that the plaintiff was a "volunteer with a private interest," and as such not in common employment with the defendants' servant, and so was entitled to recover her damages from the defendants. *Hayward v. Moss Empires Limited* (1917, C. A.) 117 L. T. Rep. 523.

Ordinarily a mere volunteer assisting in the master's work is, as regards the master, in no better position than a trespasser, and cannot claim higher protection than that the master himself, after learning of his presence, shall not wilfully or carelessly injure him. *Degg v. Midland R. R. Co.* (1857, Exch.) 1 H. & N. 773. Consequently, if injured by the negligence of a servant, he cannot recover against the master. *Eason v. S. & E. T. R. R. Co.* (1886) 65 Tex. 577; see (1918) YALE LAW JOURNAL, 415. A mere licensee stands in much the same position. *Benson v. Baltimore Traction Co.* (1893) 77 Md. 535, 26 Atl. 973. But a licensee who is on the premises on the owner's business, or on business in which both have a common interest, is entitled to the same rights as an invitee. *Holmes v. N. E. R. R.* (1871) L. R. 6 Ex. 123. There being no difference in rights, there seems little reason for the distinction in terms drawn by the English cases. And American cases call such persons invitees; in fact many cases seem to say that this is the test of an invitee: whether he is there for the benefit of the owner, or whether there is some mutuality of interest in the subject of the visit. *Plummer v. Dill* (1892) 156 Mass. 426, 31 N. E. 128; *Benson v. Baltimore Traction Co., supra; Clopp v. Mear* (1890) 134 Pa. 203, 19 Atl. 504. To such persons, English and American authorities agree, the owner is under a general duty of care to prevent injury; he is